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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1214

Iowa Beef Processors, Inc., et al.,

Petitioners,

vs.

Meat Price Investigators Ass'n, Darrell Cameron, and Don Ludvigson, et al.,

Respondents.

PETITIONERS' REPLY IN SUPPORT OF CERTIORARI

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PETITIONERS' REPLY IN SUPPORT OF CERTIORARI

I.

THIS COURT HAS CERTIORARI JURISDICTION.

The petition for certiorari, filed jointly by IBP, MBPXL, and Farr, presents for review important and timely issues of antitrust multidistrict class action litigation: whether Rule 23 permits the settlement of class claims prior to class certification, particularly when only some defendants have settled and the class certification issue remains contested; and whether a non-settling defendant has contribution rights as a matter of federal antitrust law, particularly when it would have such rights under the law of the transferor forum.

Respondents seek to obscure these substantive issues and discourage review by raising illusory jurisdictional issues of standing and appealability.

A. The Jurisdictional Questions Are Fairly Comprised in the Substantive Questions.

Respondents first argue that IBP and MBPXL have waived their right to challenge the Fifth Circuit's approval of the settlement class device because they did not specifically seek review of the lower court's holdings that non-settling defendants have no standing at all to complain about any aspect of a settlement, and, in any event, an order approving a class settlement is non-appealable. (Opp. Br. 2.) But the standing and appealability issues are necessarily "fairly comprised" within the substantive questions presented in the petition, as contemplated by Supreme Court Rule 23-1(c); they were discussed in the body of the petition (pp. 7, 15 n.4); they have been presented by respondents as objections to the jurisdiction of this Court, as contemplated by Supreme Court Rule 24-2; and they will be addressed in this reply, as contemplated by Supreme Court Rule 24-4. This is certainly not a case where new substantive issues, not raised during the briefing on the petition, are sought to be injected after certiorari has been granted, as in the *Andrews* and *Ryan* cases relied on by respondents (Opp. Br. 2). Moreover, even if it could be said that IBP and MBPXL somehow intended to waive their right to seek certiorari on the substantive issues because they did not specifically enumerate the jurisdictional issues in the "Questions Presented", the substantive questions presented for review in the petition are undeniably before the Court since Farr's standing and right to appeal the Spencer settlement are conceded.

B. IBP And MBPXL Have Standing as Prejudiced Parties.

Both the Fifth Circuit and respondents rely on the cliché that non-settling defendants have no standing to object to the merits of a settlement to which they are not parties because they are not prejudiced and it is none of their business. (Pet. A-4; Opp. Br. 9.) This is a meaningless tautology, for here IBP and MBPXL challenge not the fairness and adequacy of the settlement (which is the province of petitioner Farr, a class member whose standing is unquestioned), but the use of the settlement class device to achieve the settlement. IBP and MBPXL's vigorous opposition to class certification has clearly been prejudiced by the District Court's factual findings and legal conclusions, based solely on a stipulation between the settling parties and without following the normal adversary procedures for developing evidence and arguments, that a Rule 23 class exists.[1]

This Court has held that "standing" requires only that "the proponent of a legal right has alleged 'injury in fact'" and is asserting his own legal rights and interests (and not those of third parties). *Rakas v. Illinois*, 439 U.S. 128, 139 (1978); *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). Thus, whether IBP and MBPXL have standing depends on whether they were prejudiced in their continuing opposition to the class certification motion by

[1] It is precisely this type of prejudice that convinced this Court to outlaw the mini-hearing-on-the-merits device in *Eisen*. And it is small consolation that, as respondents suggest (Opp. Br. 16), IBP and MBPXL are faced with the Hobson's choice of either having the litigation class certification issue decided by a Judge who has already found that the Rule 23 class prerequisites have been satisfied or moving to recuse the Judge who is responsible for supervising the entire course of the litigation. Neither the Judge nor the petitioners should be placed in that position by a procedure which has no foundation in law.

use of the settlement class procedure; and whether they were prejudiced depends on whether—and under what circumstances—classes for settlement purposes are permissible under Rule 23, which is the substantive issue presented for review. Denial of review for lack of standing would necessarily decide the substantive issue, and this Court long ago condemned the masking of merits decisions through jurisdictional rulings. *Bell v. Hood*, 327 U.S. 678, 681-682 (1946).

C. The Settlement Class Orders Are Appealable.

Respondents completely ignore that the District Court's final order establishing a permanent settlement class, approving the Spencer settlement, and dismissing Spencer as a party to the case was expressly made final pursuant to Federal Civil Rule 54(b) (Pet. A-20) and, as such, was appealable as a "final decision" under 28 U.S.C. § 1291. See *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 48 U.S.L.W. 4149, 4152 (S.Ct., Feb. 20, 1980). Indeed, IBP had to take an appeal immediately or waive its claim that the order violated Rule 23. See Wright & Miller, Federal Practice and Procedure: Civil § 2654, at 34; 9 Moore's Federal Practice ¶ 110.09.

In addition, the Spencer permanent settlement class determination, as well as the Flavorland tentative settlement class order, was also appealable under the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Respondents' argument that those orders are not appealable because they do not finally terminate the entire litigation (Opp. Br. 10-11) ignores the teaching of *Cohen* and its progeny that there is a "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to

require that appellate consideration be deferred until the whole case is adjudicated." *Id.*, at 546.

The Spencer and Flavorland orders meet *Cohen*'s requirements because they both approved of the use of the settlement class device, prior to certification, to process partial settlements. IBP and MBPXL challenge the propriety of the use of the settlement class device under these circumstances—an issue which the Fifth Circuit itself characterized as "[o]ne of the most controversial issues in the management of complex class action litigation." (Pet. A-44.) It is also an issue which could not effectively be reviewed at the end of the litigation because the settlements would be final, the settling defendants would have been dismissed from the litigation, and the claimed prejudice to non-settling defendants would be incurable.

In this respect, this situation is quite unlike the discretionary grant or denial of class certification for litigation purposes which can be effectively reviewed as part of a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Rather, this case falls within the ambit of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974), where this Court applied *Cohen* to permit review of a district court's order imposing 90% of the cost of class notice on the defendants because the issue was collateral and unrelated to the merits of the litigation and the defendants' objection to the procedure had been conclusively rejected. Similarly, it has been expressly held that an order approving a class settlement is appealable under *Cohen* where it raises issues concerning the conduct of negotiations, the procedures followed at the settlement hearing, and the power of the District Court to approve the settlement of class actions. *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1119-1121 (7th Cir.), *cert. denied*, 100 S.Ct. 146 (1979).

As in *General Motors*, Judge Taylor's order finally determining the Spencer settlement class "is not tentative; it is capable of review without extensive examination of the merits; it raises issues which could not be effectively reviewed later; and it presents important, unresolved legal questions for consideration by this Court." *Id.*, at 1121. And although the order determining a tentative settlement class for purposes of the Flavorland settlement was subject to a hearing on the settlement, the procedure to be used had been established in the handling of the Spencer settlement and there was nothing tentative at all about the District Court's determination that Rule 23 permitted him to use the settlement class device, which is the issue appealed by IBP and MBPXL. That issue is comparable to the District Court's decision in *Eisen* that Rule 23 permitted a mini-hearing and the imposition of notice costs on defendants.

The Spencer and Flavorland settlement class orders "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand, supra*, 437 U.S. at 468 (footnote omitted). Nothing more is required to make them appealable under *Cohen*. Moreover, since Farr has an undisputed right to appeal the Spencer order and IBP has that right under Rule 54(b), the settlement class issue is properly before this Court regardless of any doubts about the applicability of *Cohen*.

D. The No-Contribution Order Is Appealable.

Respondents argue that Judge Taylor's order refusing to allow IBP to amend its answer to assert a cross-claim for contribution against Spencer is not a final,

appealable order because it was not "an adjudication of IBP's right to seek or obtain contribution from Spencer; but merely determines that the claim for contribution cannot be prosecuted in the context of the instant litigation." (Opp. Br. 16.) This is patently false.

Judge Taylor expressly denied leave to amend because "no right of contribution exists under the federal antitrust laws". (Pet. A-22.) A refusal to allow a cross-claim because of legal insufficiency is the same as a dismissal for failure to state a claim upon which relief may be granted under Federal Civil Rule 12(b)(6), which has *res judicata* effect. 3 Moore's Federal Practice ¶15.08[4] at 15-110; 1B Moore's Federal Practice ¶0.409[1] at 1005. Thus, Judge Taylor's denial of leave to amend was as final an order as any Rule 12(b)(6) dismissal, and IBP would have lost its claim if it had failed to appeal. Furthermore, it has been expressly held that an order denying leave to amend to assert a cross-claim for antitrust contribution is appealable, *In re Cessna Distributorship Antitrust Litigation*, 532 F.2d 64 (8th Cir. 1976), and the Fifth Circuit ruled on the merits of this issue without questioning appealability, although respondents had argued the point. (Pet. A-63-64.)

Respondents also assert that since IBP's right to contribution would mature only if and when it is forced to pay more than its fair share of a judgment, IBP's interest in contribution is "too speculative and contingent to make this an appropriate case to invoke certiorari jurisdiction." (Opp. Br. 16.) But Federal Civil Rule 13(g) expressly permits a cross-claim against a co-party who "may be liable" for all or part of the main claim and Rule 18(b) expressly permits the joinder of a claim which is contingent upon the outcome of the main claim. Thus, IBP clearly had a right to seek leave to amend its

answer to assert a contribution cross-claim.[2] Having done so, IBP was entitled to appeal the District Court's adverse ruling that contribution is unavailable as a matter of law and there is nothing so speculative and contingent about the substantive availability of contribution that certiorari is inappropriate to resolve the issue.

If the issues raised in the petition are important enough to command this Court's attention, the mumbo jumbo of standing and appealability should not stand in the way.

II.
THE SETTLEMENT CLASS DEVICE DEMANDS THIS COURT'S SCRUTINY.

A. Partial Settlement Classes Are Not Accepted and Usual.

Respondents argue that the use of the settlement class device to accomplish a partial settlement, prior to class certification, is but a discretionary application of

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[2] Indeed, failure to assert contribution at the earliest possible time might result in loss of that right:

> Under some circumstances, it may be unreasonable for one who claims contribution or indemnity to wait until liability is fixed before asserting his third-party claim. Hence, laches may indeed run before liability is conclusively determined. [*Avondale Shipyards, Inc. v. Vessel Thomas E. Cuffe*, 434 F.Supp. 920, 934 (E.D. La. 1977).]

Moreover, one of the cogent arguments favoring contribution in antitrust cases is that an adversary position among defendants during discovery and trial will lead to the fullest exposition of the relevant facts and this, as well as judicial expediency, argues for the assertion of contribution by way of a cross-claim in the main litigation rather than in a subsequently-filed contribution action where essentially the same facts would have to be retried. This is why IBP filed its motion to amend shortly before the August 11 hearing—not, as respondents charge (Opp. Br. 8), to obstruct settlement. IBP has consistently proposed an approach to contribution that permits settling defendants to be dismissed but without prejudice to non-settling defendants. (See Pet. 18.)

"accepted and usual judicial procedures". (Opp. Br. 12-14.) Nothing could be further from the truth.

As the Fifth Circuit itself conceded (App. A-44), this is one of the "most controversial issues in the management of complex class-action litigation." Juxtaposed are, on the one hand, the collective judicial wisdom embodied in the Manual for Complex Litigation which has, since its inception, flatly stated that under no circumstances should settlement classes be formed, the lack of any provision for settlement classes in Rule 23, and Professor Miller arguing against settlement classes; and on the other hand, a number of cases (Opp. Br. 13) where the Manual was honored in the breach in order to facilitate settlements. None of those cases, however, until this and the recent *Ampicillin*[3] decision, sanctioned the use of the settlement class device where it did not dispose of the entire litigation and left contested class certification issues to be decided.

To the contrary, the earliest decision to grapple with the issue held that a proposed pre-certification partial settlement should be held in abeyance until the class certification question was determined. *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 42 F.R.D. 324, 328 (E.D. Pa. 1967).[4] As far as we know, this

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[3] *In re Ampicillin Antitrust Lit.*, 82 F.R.D. 652 (D.D.C. 1979).

[4] Respondents hope to belittle the importance of this seminal decision by arguing that the Court was concerned only with lack of notice to the class. (Opp. Br. 13, n.9.) But the Court's decision was far broader: Judge Fullam was indeed concerned that, without going through the certification procedure, the Court would not have sufficient information to provide adequate notice to the class, but he was also concerned that "the parties should not be allowed to compromise [the class certification] issue in advance of the court's determination" and that "no litigant should be permitted to enhance his own bargaining power by merely alleging that he is acting for a class of litigants." (42 F.R.D. at 328.)

approach was followed in the ensuing ten years, as, for example, in *Impervious Paint Industries, Inc. v. Ashland Oil Co.*, Nos. C78-0068 & 69L(A) (W.D. Ky., 8/2/78, unreported.)

Thus, whatever might be said for not reviewing the settlement class device because a number of lower courts have ignored the Manual cannot be said for the even more objectionable practice of using it to achieve only a partial settlement, which certainly has not been "an accepted and usual" procedure. Indeed, the Fifth Circuit's sanctioning of the District Court's rubber-stamp certification of a class for partial settlement purposes is such a departure from the accepted and usual course of judicial proceedings that the exercise of this Court's certiorari power of supervision is called for under Supreme Court Rule 19-1(b). This is in addition to the fact that the growing use of settlement classes is obviously an important question of federal class action procedure which has not been, but should be, settled by this Court.

B. Settlement Classes Are Too Dangerous To Be Left To Discretion.

Respondents further attempt to denigrate the importance of the settlement class issue by arguing that the use of settlement classes turns on discretionary fact issues which, in this case, were resolved by the District Court after a full evidentiary hearing. (Opp. Br. 14-15.) But the record shows that there was no such careful consideration of either the merits of the settlement or the propriety of the settlement class.

The District Court's May 25, 1978 order "conditionally" determining the temporary settlement class and approving the Spencer settlement was a stipulated order entered during a 5-minute *ex parte* hearing with

absolutely no supporting evidentiary record, as the Manual says (§ 1.46) there should be.[5] (Pet. A-1-9.)

The August 21, 1978 order finally approving the Spencer settlement as "fair, adequate and reasonable" and non-collusive is expressly stated to be "[b]ased on consideration of the benefits to be afforded to members of the Settlement Class as set forth in the Covenant Not to Sue and Settlement Agreement" which, in fact, recites no benefits other than Spencer's payment of $425,000 and making its witnesses and documents available. (Pet. A-20.) This is because there was not even an attempt, at the August 11 evidentiary hearing, to justify the economic merits of the settlement[6] other than to have Spencer's executive vice president testify that $425,000 was all Spencer could afford to pay.[7] The hearing did last for most of the day, as respondents state (Opp. Br. 5), but was consumed mostly with argument, not with evidence that would justify a conclusion that the District Court did anything more than rubber-stamp the settlement. Nor was there any attempt to prove up

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[5] The Manual (§ 1.46) also encourages the district judge to hear from non-settling parties.

[6] Proof of probable liability and damages was particularly necessary here because there had been no prior Government proceedings involving these defendants.

[7] Spencer's executive vice president testified that Spencer had sustained a $2 million loss in fiscal 1977 and had discontinued 5 unprofitable plants. (Only 1 of those was a beef slaughtering plant and there was absolutely no evidence to support respondents' statement (Opp. Br. 6) that the closing of that plant had left IBP as the only cattle purchaser available to many class members.) But on September 3, 1978—just 3 weeks after the August 11 hearing—Spencer released its earnings report for the *9 months* ended *July 29, 1978*, showing a profit of $1,379,000 from the continuing operation of but one beef plant. This dramatic turnaround in Spencer's fortunes was obviously known—but not disclosed to the Court—at the hearing.

the elements of a Rule 23 class except to ask the Court to take blanket judicial notice of the discovery record in the supermarket class action to which the packers were not parties and which never culminated in a class action determination.

Respondents also argue that the Manual is concerned only with collusive settlements which benefit individual plaintiffs at the expense of the class they purport to represent and that this did not happen here because there were substantial settlements with two smaller defendants, leaving two larger defendants in the case. (Opp. Br. 14.) But there are all types of collusion and the Manual (§ 1.46) was as much concerned with giving uncertified class attorneys unfair leverage over smaller defendants as with giving large defendants a chance to settle class liabilities for peanuts. The overriding concern, also expressed by this Court in *Eisen*, is that the whole delicate fabric of the class action procedure would be destroyed "by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it." 417 U.S. at 177. Thus, while here smaller defendants negotiated pre-certification class settlements (for amounts which were surely *de minimus* in light of the billions of damages claimed), if the procedure is allowed to go unchallenged there is nothing to prevent large defendants from settling for enough to finance litigation expenses, leaving smaller defendants holding the bag. And how can any procedure be justified simply because smaller defendants (who may indeed be more culpable than larger defendants) are able to take advantage of it? The settlement class device is too pernicious to be left to discretionary application—particularly, as in this case, where no record-supported discretion was in fact applied.

C. Farr Challenged All Aspects of the Spencer Settlement.

Respondents are quite wrong in asserting (as did the Fifth Circuit) that Farr did not challenge the merits of the settlement. (Opp. Br. 12.) In his written opposition to the Spencer settlement, Farr specifically challenged the failure of the settling parties to allocate the lump-sum settlement between the individual plaintiffs' suits and the class action and the lack of evidence that the class settlement amount was fair and reasonable. He also objected to the settlement class device and to the proposed use of class funds to reimburse non-class plaintiffs (represented by the same attorneys as the class representatives) and to finance further class litigation which he felt was not only baseless, but in fact detrimental to the best interests of the nation's cattle feeders. His credentials, as an important pioneer cattle feeder and a founder, past president, and director of the National Cattlemen's Association, are impeccable and lend great credibility to his objections, and there is no rule that a class member can object only to the inadequacy of the settlement amount and must offer to substitute himself as the class representative, as respondents suggest.[8] (Opp. Br. 6, 12.)

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[8] The notice to the class, prepared by the settling parties and approved, *ex parte*, by the District Court, discouraged any meaningful response from class members by predicting that the entire proceeds of the settlement would be awarded to the plaintiffs for past and future expenses and there would be nothing for any class member. (Pet. A-14.) Moreover, the settlement fund was only $425,000—less than $10 per class member notified—and offered no incentive to intervene. Since neither opting out nor intervention would be worthwhile, the settling parties were virtually assured of no significant opposition. Under these circumstances, only an elder statesman in the cattle industry, like Farr, could be expected to appear.

D. IPB and MBPXL Were Prejudiced.

Finally, respondents argue that IBP and MBPXL have suffered no legally cognizable prejudice with respect to the litigation class certification issues because the District Court's determination of the settlement class places them in the same position as "that of any litigant who finds that the court before which his case is pending has recently decided a factually or legally similar question in a manner adverse to him." (Opp. Br. 15-16.) This argument is wholly specious because there are not, here, two completely distinct pieces of litigation with different parties, but instead a single case in which IBP and MBPXL are both defendants. The great injustice, quite different from the routine operation of *stare decisis*, is that IBP and MBPXL were denied even standing to object to the settlement class procedure, but then found the District Court's settlement class findings of fact and conclusions of law used against them on the litigation class question. The perversity of this entire procedure is best shown by plaintiffs' counsel's opening statement to the District Court at the December 12, 1978 class action evidentiary hearing, taking the position that all of the class action issues involved in the settlement class determination should be considered *res judicata*.

The settlement class device needs desperately to be reviewed by this Court before it becomes an unbridled vehicle for coercive and collusive settlements, completely undermining orderly class action procedures.

III.

THERE ARE CONFLICTS ON THE ANTITRUST CONTRIBUTION AND CHOICE OF LAW ISSUES.

A. The Contribution Conflict.

Respondents argue that there is no real conflict in the Circuits on the contribution rights of antitrust co-defendants because this case involves a Rule 13(g) cross-claim for contribution against a settling co-defendant, whereas the Eighth Circuit's decision in *Professional Beauty Supply* involved a Rule 14(a) third-party complaint. (Opp. Br. 17.) Just why this makes a difference is unexplained, since both rules embody the same language permitting a defendant to assert a claim against someone who "may be liable" to him "for all or part of" the plaintiff's claim. The procedural setting in which the contribution issue is raised is completely irrelevant to the fundamental question whether contribution is available at all.

In *Professional Beauty Supply*, the Eighth Circuit said (594 F.2d at 1186):

> In sum, we adopt for the Eighth Circuit the rule that contribution may be enforced among joint tortfeasors in an antitrust action.[9]

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[9] In the discussion preceding this conclusion, the Eighth Circuit did note that "[t]he problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case"—not, as respondents suggest (Opp. Br. 18), to imply that contribution might not apply in such a case, but rather to affirm that allowing contribution need not "undermine the judicial policy in favor of settlement" because it should be possible to "fashion a rule of contribution which will protect the rights of settling defendants" in such a case. (594 F.2d at 1184.) And that is exactly what a district court in the Eighth Circuit has now done to implement the Eighth Circuit's contribution rule in a procedural context (a cross-claim against a settling defendant) identical to that presented here. *Little Rock School District v. Borden, Inc.*, 1980-1 Tr. Cas. ¶63,059 (E.D. Ark. 1979).

Next, in *Abraham Construction Co. v. Texas Industries, Inc.*, 604 F.2d 897, 900 (5th Cir.), *rehearing denied*, 608 F.2d 524 (5th Cir. 1979), *cert. petn. pending*, No. 79-1144, which, like *Professional Beauty Supply*, involved a third party complaint, the Fifth Circuit flatly rejected the Eighth Circuit's rule:

> Although we have carefully considered the arguments set forth in the [Eighth Circuit] majority's opinion, we are unable to agree that a right of contribution should be allowed among violators of the antitrust laws.

Thereafter, the Fifth Circuit simply followed its no contribution rule in this case and the *Westvaco* case in which a petition for certiorari is also pending (No. 79-972) and in which this Court has requested the views of the Solicitor General. Both of these cases involve cross-claims against settling defendants. The Fifth Circuit did not even mention the difference between the procedural context in *Abraham Construction Co.*, and in this case, but merely said: "That decision controls this case." (Pet. A-64.)

Finally, the Tenth Circuit chose to follow the Fifth Circuit's no contribution rule in still another procedural context—an independent suit for contribution following payment of a judgment by one joint tortfeasor. *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Tr. Cas. ¶ 62,995 (10th Cir. 1979), *rehearing en banc granted* (Dec. 27, 1979).

Thus, the Fifth and Eighth Circuits are in direct conflict and the Tenth Circuit has conditionally sided with the Fifth Circuit on the substantive law issue of the availability of antitrust contribution—and just about every imaginable procedural context is involved. If this is not a conflict among the Circuits, it is hard to imagine what is.

B. The Choice of Law Conflict.

Respondents also argue that the Fifth Circuit did not err in refusing to apply the contribution law of the Eighth Circuit, from which all of the actions involved in this case were transferred. They say that only the *state* law—and not the *federal* law—of the transferor forum need be applied by the transferee forum, citing *In re Pittsburgh & Lake Erie R. Co.*, 543 F.2d 1058, 1065 n.19 (3rd Cir. 1976). (Opp. Br. 18.) While we believe that proposition was *dictum* in that case, if it was the holding, as respondents claim, it squarely conflicts with holdings of the Second Circuit and the Judicial Panel on Multidistrict Litigation[10] and provides still another conflict for this Court to resolve.

It is obvious, as respondents argue, that if there is to be a consolidated trial of cases transferred from courts with diverse substantive law, that of one jurisdiction must be chosen.[11] Where the conflict is between the substantive law of different states, as in consolidated diversity cases like *Bott* (Opp. Br. 18), the trial court is compelled to choose one jurisdiction's law because no federal court can resolve a local law conflict between the states. But where, as here, the conflict is in the interpretation of federal law, this Court is expressly authorized to resolve the conflict and that is why certiorari should be granted here. The Fifth Circuit's unreasoned choice of its own law constitutes an overruling of Eighth

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[10] *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 408 n. 7 (2nd Cir. 1975); *In re Plumbing Fixtures Litigation*, 342 F.Supp. 756, 758 (JPML 1972).

[11] There are two easy alternatives to consolidation that would avoid the choice of law problem: Severance for trial under Federal Civil Rule 42(b) or remand to the transferor court pursuant to 28 U.S.C. 1407(a).

Circuit law *sub silentio* and, therefore, a usurpation of this Court's power.

Finally, the arguments (Opp. Br. 19) that the law of antitrust contribution is in its early stages of development and Congress is considering a bill to resolve the controversy (in favor of contribution, it might be noted) are irrelevant to the need for certiorari in this case. The point is that contribution is a current, vital issue affecting the entire course of antitrust litigation, and the conflict needs to be resolved as soon as possible on the basis of existing law, not speculative future legislation.

CONCLUSION

The Spencer settlement (and, later, the Flavorland settlement) was carefully designed to avoid the class certification procedure required by Rule 23(c)(1) and the kind of scrutiny of the compromise of class claims mandated by Rule 23(e). The mere threat of class certification became the vehicle for a settlement of class claims which was inherently both coercive and collusive: The settling defendants were forced to the bargaining table, despite the absence of any evidence of antitrust violations, but also took advantage of the situation to avoid litigation costs and possible exposure to billions in damages for relatively insignificant amounts designed solely to benefit the non-class and representative plaintiffs. The District Court, tied into the procedure from the outset by *ex parte* communications, required no proof of probable liability or damages, which go to the heart of the fairness and adequacy of the settlement, and no proof that the settlement class met Rule 23's stringent requirements of typicality and adequacy of representation, predominant common questions of fact or law, and manageability. Non-settling defendants were denied standing

to challenge the procedure, but then had the settlement class approval used against them in their continuing opposition to the certification of a litigation class. Absent class members were discouraged from appearing by a notice which virtually promised reimbursement of undisclosed expenses to non-class and representative plaintiffs, leaving nothing for the class. And the class member who dared to oppose the procedure was ignored because he objected to the misuse of class claims to generate a fund to be used for purposes contrary to the best interests of the class.

What happened here perfectly illustrates why the Manual correctly warned that neither Rule 23 nor the wise administration of class actions authorizes settlement prior to certification and why no court (until this case) approved a class settlement which did not completely dispose of the case.

Certiorari should be granted to nip the pernicious precertification settlement device in the bud and, at the same time, review and clarify the interplay of antitrust contribution and partial settlements.

ADDENDUM REPLY TO PLAINTIFFS' SUPPLEMENT

As this reply was being printed, petitioners received a "Supplement to Joint Brief in Opposition to Petition for Writ of Certiorari" filed by the plaintiffs but not joined by settling defendants Spencer and Flavorland. This astonishing document reveals plaintiffs' strategy to cause the greatest possible prejudice to IBP and MBPXL through the settlement class device and also plaintiffs' desperation to avoid the contribution issue through gross distortions of the record. Plaintiffs' supplement injects matters wholly extraneous to whether certiorari should be granted to decide the substantive issues raised by the petition, but its misrepresentations cannot go unanswered.

I.

DENIAL OF LEAVE TO CROSS-CLAIM FOR CONTRIBUTION WAS NOT A DISCRETIONARY RULING.

In the joint brief opposing certiorari, both plaintiffs and the settling defendants argued that this Court should not review the substantive antitrust contribution issue because the District Court's order denying leave to amend IBP's answer to assert a cross-claim for contribution against Spencer was not a final determination that contribution was not available and because the conflict in the Circuits is over the right of contribution against a third-party defendant, not a co-defendant. (Opp. Br. 16-19.) As demonstrated above, neither of these propositions is true as a *matter of law.*

Now, plaintiffs (but not Spencer and Flavorland) make the further argument that the District Court's

denial of leave to amend was based upon the discretionary grounds of unreasonable delay, lack of facts to support the contribution claim, and prejudice to the settling parties and a third party (Land O'Lakes). (Supp. Opp. Br. 2-5.) This proposition is also untrue—this time as a *matter of fact.*

District Judge Taylor's order denying IBP's motion to amend its answer to assert a cross-claim for contribution against Spencer under Rule 13(g) was expressly based

> [u]pon the memoranda of law, and upon this Court's determination that no right of contribution exists under the Federal antitrust laws, and upon all of the files, records and proceedings herein * * *.[12] [Pet. A-22.]

Nowhere in the record (let alone in the order itself) did Judge Taylor indicate that leave to amend was being denied because of delay, lack of facts, or prejudice, though plaintiffs had argued those points.

Nor would there have been any basis for a discretionary denial of leave to amend on those grounds. IBP moved for leave to amend shortly before the August 11, 1978 hearing because it had become apparent that the District Court intended to approve the settlement and Spencer would be dismissed. Unless IBP made its motion then, it would lose the right to cross-claim against a co-defendant and (if not barred by laches) would be relegated to a separate contribution suit at the end of the line. IBP cross-claimed against Spencer—and not against the other co-defendants—because it was

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[12] Plaintiffs' suggestion that the reference to "the files, records and proceedings herein" was intended to cover the procedural discretionary grounds now argued to support the order is ludicrous: Judge Taylor routinely makes that reference in all of his orders, after stating the specific grounds for his decisions. (See Pet. A-5, 23.)

about to be dismissed; the others were not. IBP had, indeed, earlier argued that a prayer for injunctive relief in the *Cameron* complaint against a variety of industry-wide practices should be dismissed for failure to join the other 1,665 packers without whom effective relief could not be granted. But that motion was denied and there was no reason—or compulsion—at this stage to try to implead other packers who were not named as co-conspirators in the treble damage complaints. IBP's cross-claim was in no sense untimely: The class action had not been filed until July, 1977, there had been no progress at all in any of the cases since that time, and the Spencer settlement was not even disclosed until May 25, 1978.

Nor was IBP's motion to amend filed in bad faith solely to keep Spencer in the case;[13] rather, a contribution cross-claim is the only rational way IBP could protect its rights if discovery and trial should prove that the cattle purchasing practices at issue, common to Spencer as well as IBP, violated the antitrust laws, but that

[13] Plaintiffs falsely suggest (Supp. Opp. Br. 4) that IBP's General Counsel (Heubaum) told Spencer's General Counsel (Eastwood) he would do everything possible to keep Spencer in the litigation. Heubaum testified that, when Eastwood called him to apologize for being forced into a settlement, Heubaum told Eastwood that if Spencer was going to settle, IBP would have to consider filing a cross-claim for contribution. Eastwood confirmed that Heubaum's testimony of what was said was correct "in sum and substance" except he apparently interpreted it as meaning that the purpose of the cross-claim was to keep Spencer in the litigation. (8/11/78 Tr. 61-62, 75.) In fact, IBP did not use the cross-claim as a device to keep Spencer in the litigation. IBP has urged consistently that contribution be applied, as it has in the Eighth Circuit (*supra*, p. 15 n.9), to permit a defendant to settle not only its liability to the plaintiffs, but also its contribution liability to co-defendants. This is accomplished by reducing any judgment to the extent of the settling defendants' share of the collective fault.

Spencer's settlement was less than its fair share of damages. Certainly IBP denied—and continues to deny—that it has done anything wrong; but if it has, Spencer is equally culpable and the proposed cross-claim was as specific as it could be without knowing the basis for plaintiffs' grapeshot allegations of antitrust liability.

Allowing the cross-claim to be pled would not have delayed this litigation, which is still in its infancy. Indeed, merit discovery had not even commenced.

There is no way that Land O'Lakes could have been prejudiced by allowing the cross-claim. Its original tender offer for Spencer's stock (at double the current market price) was contingent on Spencer being dismissed from the antitrust litigation (an additional element of coercion on Spencer), but Land O'Lakes expressly waived that condition and consummated the tender in October, 1978 even though Spencer's dismissal was being appealed. Land O'Lakes was in no sense a surprised third party "which purchased Spencers [sic] assets relying on the settlement", as plaintiffs assert. (Supp. Opp. Br. 4.) Nor does Spencer (now owned by Land O'Lakes) make any such claim, for it did not participate in the plaintiffs' supplemental brief.

In any event, settling parties cannot by their settlement extinguish whatever contribution rights a non-settling defendant may have, *Martello v. Hawley*, 300 F.2d 721, 724 (D.C. Cir. 1962); *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620, 625 (S.D.N.Y. 1972), and IBP's contribution proposal of reducing plaintiffs' damage claims by the settling defendants' share of liability would deter only those cheap, collusive settlements which should not pass muster under Rule 23(e) anyway.

Therefore, not only did the District Court base its denial of leave to amend solely on the legal conclusion that no right of contribution was available; but there was no basis for a discretionary denial on any other ground. Finally, the Fifth Circuit, whose decision is at issue here, affirmed solely on the ground that contribution is unavailable as a matter of law.

II.

RECUSAL IS NEITHER ADEQUATE NOR TENABLE.

Plaintiffs now "disavow" the contention made in the joint opposition to certiorari (Opp. Br. 16) that the non-settling defendants' only remedy to the prejudice stemming from the settlement class determination was to seek the recusal of the District Judge. If the settling defendants actually believed recusal to be a realistic remedy, they missed the whole point of plaintiffs' strategy: having the District Judge who certified the settlement class find himself locked in to plaintiffs' class contentions when he turned to the litigation class question. Plaintiffs claim (Supp. Opp. Br. 5) that the District Judge has said that the settlement class will not affect his litigation class decision, but their record references simply do not support that statement[14] and plaintiffs have argued exactly the contrary to the District Court.

The settling parties' disagreement over whether Judge Taylor should recuse himself from deciding the litigation class certification motion perfectly illustrates the

[14] Plaintiffs' record citations are to the orders conditionally determining the Spencer and Flavorland settlement classes and settlements, prepared by the settling parties, which merely recite that counsel for the settling parties "agree to the formation of a Temporary Settlement Class solely for purposes of this proposed settlement." (Pet. App. 6-7, 25.)

non-settling parties' prejudicial dilemma. The obvious solution is neither recusal (a harsh remedy which would destroy the utility of multidistrict transfers to a single judge who can manage the entire course of complex litigation) nor giving plaintiffs the bootstrap of a preliminary, uncontested determination of class propriety. Rather, the only solution fair to all parties is to prohibit settlement classes, which, after all, only requires that settlement be deferred until the Court makes the expeditious determination whether the action may be maintained as a class action which is mandated by Rule 23(c)(1).

Respectfully submitted,

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